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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 287

AL POLIZZI,
Petitioner,

v.

COWLES MAGAZINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

No formal opinion was filed in the District Court, but the ground for dismissing the action is stated in the order of the District Court as follows (R. 143):

> "* * * the Court * * * finds as a matter of fact that defendant was not, at the time of the service of the summons, doing business in this district and that, therefore, this Court does not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code."

The opinions in the Court of Appeals for the Fifth Circuit are reported at 197 F. (2d) 74.

Jurisdiction.

The basis of jurisdiction is correctly set forth in the petition.

Questions Presented.

1. Whether respondent, publisher of leading magazines of national circulation, with no office, place of business, property, listing or activities in the State of Florida, and which has not qualified to do business or consented to accept service in said state, is transacting business in said state solely by reason of periodic visits paid to said state by two minor employees of respondent whose sole duties are to check the display and position of respondent's magazines at newsstands and other retail outlets, to report complaints of such retailers to respondent's New York office, and occasionally to put up a few advertising posters.

2. Whether a minor employee of respondent whose sole duties are to check the display and position of respondent's magazines at newsstands and other retail outlets, to report complaints of such retailers to respondent's New York office, and occasionally to put up a few advertising posters, is an agent transacting business for the respondent in the State of Florida, within the meaning of Section 47.17 of the Florida Statutes Annotated.

Statutes Involved.

Section 47.17, Florida Statutes Annotated, provides that process against any corporation, domestic or foreign, may be served upon certain designated officers and agents, or a director, of the corporation. It further provides:

> "If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be made upon any agent transacting business for it in this state."

Statement.

Petitioner, a resident of Florida (R. 6), commenced this action against respondent in a Circuit Court of Florida, alleging that the May 23, 1950 issue of respondent's magazine LOOK contained an article which constituted a libel upon the petitioner (R. 6-18). Upon respondent's petition, the action was removed to the United States District Court for the Southern District of Florida, Miami Division (R. 1-4). Respondent further moved to dismiss the action or to quash the return of service on one Paul T. Briardy, as an agent of respondent, upon the following grounds (R. 141):

> 1. That the respondent was not subject to service of process within the State of Florida, inasmuch as it was organized under the laws of Iowa, was not transacting business in Florida, and had not appointed an agent for service of process in Florida; and

2. That Briardy was not an officer, a manager or general agent, or an agent authorized by appointment or by law to receive service of process for respondent.

The motion to dismiss having been granted in the District Court, judgment was entered thereon and petitioner appealed (R. 143-145). The Court of Appeals for the Fifth Circuit affirmed, Judge Russell dissenting (R. 160). Both the District Court and the Court of Appeals based their decisions on the resolution of the questions of fact presented.

The pertinent facts may be summarized as follows:

Respondent, publisher of LOOK, QUICK and FLAIR magazines, is an Iowa corporation, with its principal corporate office in Des Moines, Iowa, and other offices located in New York City, Chicago, Boston, Cleveland, Detroit, Philadelphia, Los Angeles and San Francisco (R. 96-97). It has never qualified to do business in Florida and has never conducted any business in that state (R. 24, 131-132). It has never had any office, listing, bank account, securities, safe deposit box or other personal property, or any real estate, in Florida, nor has it ever had any books or records in Florida (R. 24, 131). None of its officers or directors resides in Florida nor does any officer, director or employee (except the two circulation road men to whom we will later advert), perform any services for the Company in Florida (R. 131, 91). Particularly and specifically, respondent has no salesman or other employee in Florida soliciting advertising or sales of its magazines (R. 127).

The material for LOOK Magazine is selected, edited and put in final form for printing in New York City;

the magazine is printed and bound by an independent company in Chicago (R. 129). LOOK Magazine is purchased by the public in two ways: first, in single copies, from newsstands and other retail outlets; second, by subscription. Subscriptions are sold (a) by respondent through direct mail orders (R. 114), (b) by independent companies (loosely referred to as "subscription agents"—although they are in no sense agents of respondent) which send soliciting crews into various states, taking orders for many different magazines (R. 40, 125-126), and by individuals who solicit subscriptions on their own (R. 126), and (c) by retail outlets, *i. e.*, independent retailers, such as newsstands, which transmit subscriptions to respondent directly or through the wholesalers (R. 40). Subscriptions are subject to rejection by respondent (R. 126), and are serviced from respondent's Des Moines office (R. 132). All subscription copies are mailed direct to subscribers from the bindery in Chicago (R. 133).

Single copy sales are handled by independent retailers, which purchase their copies from wholesalers. Respondent sells copies of LOOK to about 300 wholesalers throughout the country (R. 116), the largest of which is The American News Company, which has branches throughout the United States and which handles a total of approximately 400 magazines (R. 117, 41-42). The relationship between respondent and the wholesalers is that of "vendor and vendee" (R. 102, 42). The copies of LOOK Magazine are shipped from the bindery in Chicago to the wholesalers by common carrier (R. 129-130), and respondent bills the wholesalers for the copies shipped (R. 24, 132). In turn, the wholesalers sell to the retailers (R. 39). Respondent deals *only* with the wholesalers—

it does not even have a record of the names and places of business of the retail outlets which sell its magazines to the public (R. 110).

Respondent's only representatives in Florida are two circulation road men. Neither of them resides in Florida and neither of them is regularly stationed in that state; their sole duties are to check the display and position of respondent's magazines at newsstands and other retail outlets, to report any complaints of retailers to respondent's New York office, and occasionally to put up a few advertising posters (R. 60, 63-64, 70). *The road men do not solicit subscriptions or advertising* (R. 71, 80, 86, 87, 111).

Paul T. Briardy (to whom the summons and complaint in this action were delivered by the marshal), covers the entire State of Florida with the exception of Pensacola (which is covered by the other road man), in addition to Alabama, Georgia, Mississippi and South Carolina (R. 83, 91, 110). His authority and activities are limited as set forth in the preceding paragraph. He has no desk or office space in Florida, but prepares his reports at his hotel room, wherever he may be (R. 71-72). He has nothing to do with the physical handling or distribution of respondent's magazines (R. 85, 108); he has no authority to employ anyone for respondent, to buy or sell anything for it, or to make any contracts or commitments for it (R. 74-75, 84, 110). He has no part in selecting the wholesalers, no authority to give directions to any wholesaler and no authority to cut off any wholesaler or to cancel any shipments to it (R. 64, 66, 84, 85). For his services Briardy receives a salary of $75 per week (not $105 per week as petitioner states—Pet. 10), plus $30 per week to reimburse him for the gas,

oil and upkeep of the automobile in which he travels through the five States which constitute his territory (R. 67-69). This automobile belongs to Briardy; he purchased it, pays his own insurance, pays for its upkeep and uses it for his own personal pleasure as well as Company business (R. 67-68). He receives no commission or other additional compensation (R. 85, 121).

ARGUMENT.

I.

The opinions of the Court below show clearly that the District Court decided *as a question of fact* that respondent was not transacting business in the State of Florida, and that this finding of fact was affirmed by the Court of Appeals. Although petitioner makes an earnest effort to convince this Court that the decisions below are in direct conflict with the opinion of this Court in *International Shoe Co.* v. *State of Washington*, 326 U. S. 310, an analysis of the *International Shoe Co.* case shows the fallacy of this argument.

In that case, the reasoning of this Court followed the line of decision of the Supreme Court of Washington, explained by Mr. Justice Stone as follows (326 U. S. at p. 314):

> "The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was

> also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there."

This is the so-called "solicitation plus" rule. In the case now under consideration, there has been no "regular and systematic solicitation of orders in the state by (respondent's) salesmen, resulting in a continuous flow of (respondent's) product into the state * * *" In fact, there has been no solicitation of business whatever by any representative of respondent—either of sales of the magazines or of advertising contracts. It cannot be said, therefore, that the judgments of the courts below are in conflict with the decision of this Court in the *International Shoe Co.* case, for the facts in the instant case are wholly different, not merely in detail or quantitatively, but in their very nature. None of the activities of the appellant in the *International Shoe Co.* case finds a parallel in the work of respondent's road men in this case, nor does any activity of the latter bear comparison with the activities of the Shoe Company salesmen.

On the contrary, the judgments in the courts below are wholly consistent with the principle enunciated in the *International Shoe Co.* case. If we correctly understand this principle, it is to the effect that where a corporation engages in *substantial* activities in a state, to such an extent (taking into consideration

the quality and nature of these activities), that it can be said that it is "present" in the state, it may be made subject to service of process in that state. Bearing in mind that no substantial element of any of respondent's basic activities, viz., the editorial creation and physical production of its magazines, the sale of its magazines and the sale of advertising space in its magazines, is carried on by respondent in Florida, the conclusion is inevitable that the courts below in holding that respondent was not transacting business in the State of Florida fairly followed the principles laid down in the *International Shoe Co.* case.

II.

Basically, petitioner misconstrues the holding in *International Shoe Co.* v. *Washington.* In that case it was the corporation which had been held amenable to service of process which appealed to this Court on the ground that the ruling below constituted a violation of the due process clause of the Constitution. In the case now before the Court no question of due process is involved. All that has happened is that a Federal Court, construing a state statute, has held that under the statute the respondent has not so conducted itself as to render itself amenable to the service of process within the state.

The *International Shoe Co.* case marked the limitations of a state's authority to subject a foreign corporation to service of process; it by no means held that a state was required to subject a foreign corporation to service of process if the minimum activities of

the corporation described in the *International Shoe Co.* case were present.

It is the latter rule which the petitioner now seeks to induce this Court to propound, for the instant case arose in the State court and the question of jurisdiction must be decided under Florida law—in particular, Section 47.17, Florida Statutes Annotated, *supra*.

Clearly, this is neither a question of "due process" nor, indeed, a Federal question of any nature. As the Court said in *Pulson* v. *American Rolling Mill Co.*, 170 F. (2d) 193, 194:

> "There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. Const. art. 1, sec. 8, cl. 3; Amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert

jurisdiction over the defendant in a particular situation."

To the same effect, see,

Perkins v. *Benguet Consol. Min. Co.*, 342 U. S. 437.

III.

Petitioner further contends that the judgments herein are in conflict with the following cases in the First, Second and Seventh Circuits, viz., *Schmikler* v. *Petersime Incubator Co.*, 177 F. (2d) 983; *French* v. *Gibbs Corporation*, 189 F. (2d) 787, and *Consolidated Cosmetics Co.* v. *D-A Pub. Co., Inc.*, 186 F. (2d) 906. We find no such conflict.

The *Schmikler* case involved the application of the "solicitation plus" rule. In *French* v. *Gibbs*, the defendant corporation concededly had been doing business in the State of New York until a month prior to the service of process upon it. It had not wholly withdrawn from the State, and the claim in suit was an action for breach of a contract that had been made, performed, and breached in the State of New York. Under these circumstances, the Court held that the defendant was subject to suit in New York. In *Consolidated Cosmetics* v. *D-A Pub. Co.*, the defendant, a New York corporation, published a magazine entitled "Taboo", which the plaintiff alleged infringed its registered trademarks "Tabu" and "Tabgo". Service was effected in Illinois. Defendant's magazines were printed, addressed and deposited in the mail in Illinois, and defendant owned other prop-

erty in that state. Furthermore, in its application for second-class mailing privileges, it had designated Mt. Morris, Illinois, as a place of business.

None of these cases involved a factual situation which even remotely resembles the facts in the instant case. Under the *International Shoe Co.* case, *supra*, the determination of amenability to jurisdiction depends on the facts involved. Petitioner is, therefore, wholly unwarranted in urging that there is a conflict in decision between the judgment of the Court of Appeals in this case, and the cited decisions in the First, Second and Seventh Circuits.

IV.

This case involves no constitutional issue and no Federal question. It involves no principle of importance to anyone except the parties litigant. It involves no conflict of decision between the Circuits. What it does represent is a stubborn determination on the part of the petitioner to try his case in a jurisdiction of his own choosing, irrespective of the fact that the respondent is not "present" in the State of Florida.

But the respondent is "present" in Iowa, New York, Illinois and California. Surely this should give petitioner ample choice of venue. It is difficult to understand why "traditional notions of fair play and substantial justice" will be offended if petitioner is asked to prosecute his action in one of the four States mentioned, while these "traditional notions" would not

be offended if respondent were compelled to bring its witnesses to Florida from Chicago, Cleveland and New York, in order to establish a defense of truth.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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